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# A Missing Piece: The Importance of Control Over an Undue Hardship in a Request to Discharge Student Loans Through Bankruptcy

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A Missing Piece: The Importance of Control Over an  
Undue Hardship in a Request to Discharge Student Loans  
Through Bankruptcy

Megan E. Niespodziany<sup>1</sup>

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## INTRODUCTION

As of 2015, 41.6 million students had received federal aid in the United States, together sustaining a total of \$1.212 trillion dollars in student loan debt.<sup>1</sup> This is more than double the cumulative amount of outstanding federal student aid in 2007, which was \$516 billion.<sup>2</sup> There are many problems in our country's student loan system that have resulted in these remarkable numbers, including skyrocketing costs of tuition, the ease with which lenders supply tens of thousands of dollars to students, and the effectiveness of repayment programs.<sup>3</sup> Separate from the process by which a student applies for aid, attends school, graduates, and pays back the debt, one looming problem concerns the issues presented when a student loan debtor files for bankruptcy.<sup>4</sup>

When a debtor files for bankruptcy, the goal is to give the debtor a "fresh start" and discharge the entirety of his debts.<sup>5</sup> However, there are exceptions to this general principle.<sup>6</sup> For example, discharge is not permitted for loans obtained by fraud,<sup>7</sup> for luxury goods aggregating more than \$650 owed to a single creditor of which was incurred on or within 90 days before filing,<sup>8</sup> or for restitution payments owed.<sup>9</sup> For the purposes of this Note, the exception prohibiting the discharge of student loans is the most important.<sup>10</sup>

Until 1976, the bankruptcy laws did not address student loans or treat student

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<sup>1</sup> *Federal Student Loan Portfolio*, FED. STUDENT AID: AN OFF. OF THE U.S. DEPT OF EDUC., <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls> (last visited Sept. 21, 2016).

<sup>2</sup> *Id.*

<sup>3</sup> See Kevin J. Smith, *Defining the Brunner Test's Three Parts: Time to Set a National Standard for All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 251–55 (2013) (discussing various problems with the U.S. loan repayment system).

<sup>4</sup> See *id.*

<sup>5</sup> *Id.* at 267. This result is accomplished most often through a Chapter 7 bankruptcy filing for which the debtor's assets are liquidated and distributed to creditors, providing "rapid relief" for the debtor, versus a Chapter 13 bankruptcy filing for which debtors retain their property but agree to a plan to repay the debt for three to five years, after which the remaining debt will be discharged. Sarah Edstrom Smith, *Should the Eighth Circuit Continue to be the Loan Ranger? A Look at the Totality of the Circumstances Test for Discharging Student Loans Under the Undue Hardship Exception in Bankruptcy*, 29 HAMLINE L. REV. 601, 609–10 (2006). See also *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) ("[I]t gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.").

<sup>6</sup> See 11 U.S.C. § 523 (2016).

<sup>7</sup> *Id.* § 523(a)(2)(A).

<sup>8</sup> *Id.* § 523(a)(2)(C)(i)(I).

<sup>9</sup> *Id.* § 523(a)(13).

<sup>10</sup> *Id.* § 523(a)(8).

loans differently than other types of debts.<sup>11</sup> As student loans became more of the norm as a means of paying for education, and as concerns rose over possible abuse, student loans became non-dischargeable through many amendments to the Bankruptcy Code (the Code).<sup>12</sup> Now, as a general principle, student loans are non-dischargeable in bankruptcy unless the debtor can show that the loans impose an undue hardship upon him or his dependents.<sup>13</sup> The fear was that students would incur massive amounts of student loan debt and immediately after graduation would file for bankruptcy, essentially defrauding the system, which would inevitably lead to a breakdown of the bankruptcy and student loan systems.<sup>14</sup>

There are great arguments for and against allowing a discharge of student loans, but the undue hardship test, the standard used to determine whether a student loan should be discharged, remains problematic for courts. The student loan discharge process has been highly inconsistent among courts because the Code does not define “undue hardship,” which has forced courts to hash it out themselves.<sup>15</sup> “Establishing a consistent . . . standard for courts is difficult because the legal issues presented are often fact-driven,”<sup>16</sup> but this should not be an excuse for the lack of guidance provided.

The most important factor in determining whether a student loan should be discharged revolves around whether the circumstances that led to the debtor’s

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<sup>11</sup> Sarah Edstrom Smith, *supra* note 6, at 611. The first Bankruptcy Act of 1898 did not address student loans. *Id.* at 611. Later, Congress adopted the Education Amendments of 1976, making federal student loans non-dischargeable unless the repayment period began at least five years prior to filing. *Id.* at 612. In 1990, the five-year timeline was extended to seven, and the exception provision was made to include Chapter 13 bankruptcies. *Id.* at 612–13. In 1998, the time exception was eliminated, leaving only an undue hardship exception to non-dischargeability. *Id.* at 612. In 2005, the Code was expanded to include not only government loans, but also “loans issued by profit and nongovernmental organizations.” *Id.* at 613.

<sup>12</sup> *Id.* at 611–12. “After all, the government is the backer on those loans . . . and federal loans have a lot of options for repayment such as Income Based Repayment and loan forgiveness programs that give borrowers more realistic options for repayment and a way out.” Kayla Webley, *Why Can’t You Discharge Student Loans in Bankruptcy?*, TIME (Feb. 9, 2012), <http://business.time.com/2012/02/09/why-cant-you-discharge-student-loans-in-bankruptcy/>.

<sup>13</sup> § 523(a)(8). See *Educ. Credit Mgmt. Corp. v. Jespersen*, 571 F.3d 775, 782 (8th Cir. 2009) (“Congress carved an exception to the ‘fresh start’ permitted by discharge for unpaid, federally subsidized student loans. If the debtor . . . can make student loan repayments while still maintaining a minimal standard of living, the absence of a fresh start is not an undue hardship.”).

<sup>14</sup> *Id.*; see also *Lohman v. Conn. Student Loan Found. (In re Lohman)*, 79 Bankr. D. Vt. 576, 580–81 (1987) (stating that increased incidence of debtors discharging loans without any repayment posed a “threat to the continuance of the educational loan programs”).

<sup>15</sup> See § 101 (providing no definition for “undue hardship”); see also Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L. J. 495, 496 (2012).

<sup>16</sup> Chandler Harris, *The Dischargeability of Student Loan Debt in the Sixth Circuit*, TENN. B. ASS’N (Mar. 1, 2013, 1:00 A.M.), <http://www.tba.org/journal/the-dischargeability-of-student-loan-debt-in-the-sixth-circuit>.

inability to pay were within the debtor's control.<sup>17</sup> As will be discussed in more detail below, the second prong of the *Brunner* Test, (the test most widely used to establish undue hardship)<sup>18</sup> which corresponds to circumstances beyond the debtor's control, requires a demonstration "that additional circumstances exist indicating that this state of affairs is likely to persist . . . ."<sup>19</sup> Although this prong regards a timing issue (how long the circumstance is likely to persist), it also is extremely important that the circumstance be "beyond the debtor's control."<sup>20</sup> This Note may use the term "control" or "self-imposed" interchangeably to discuss this concept.

Because part of the purpose of the exception to student loans was to prevent debtors from taking advantage of the bankruptcy system, it is important that courts are cognizant of self-imposed hardships. As one may imagine, self-imposed hardships should be particularly unworthy of discharge under bankruptcy. A hypothetical depiction of this phenomenon would be when a debtor incurs \$200,000 in student loans, majors in chemical engineering, and takes a job after graduation as a career bartender.<sup>21</sup> Courts are, and should be, particularly wary of debtors attempting to discharge loans in circumstances such as these.

Part I of this Note will depict the undue hardship test, with particular attention to the second prong, the circumstances surrounding the debtor's inability to pay, and will explain why this is the most important part of the analysis. Part II of this Note will analyze the obvious uncontrollable hardships, which courts should not hesitate to discharge. Within this category would be the student loan debtor who, for example, has a serious medical illness, like multiple sclerosis, which renders him disabled and unable to work for the foreseeable future. One can see that this hardship is uncontrollable and not self-imposed in any way. As long as the debtor does not have the requisite disposable income required to make minimum payments, courts should discharge student loans in this kind of situation. Part III of this Note will analyze hardships that are clearly not deserving of a student loan discharge because of the control that the debtor has on their circumstances. Part IV of this Note will present recommendations for accounting for the presence of self-imposed hardships in bankruptcy proceedings and will explain why these hardships are so harmful to the integrity of the exception and to the bankruptcy and student loan system. These recommendations include (1) providing a definition of "undue hardship" in the Code for purposes of 11 U.S.C. 523(a)(8), which would declare

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<sup>17</sup> *Frushour v. Educ. Credit Mgmt. Corp. (In re Frushour)*, 433 F.3d 393, 401 (4th Cir. 2005); *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 358–59 (6th Cir. 2007).

<sup>18</sup> Iuliano, *supra* note 15, at 496.

<sup>19</sup> *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

<sup>20</sup> *Barrett*, 487 F.3d at 359.

<sup>21</sup> With regard to attending college and choosing a major, many contend that society and colleges themselves are at fault for encouraging students to enroll in degree programs that are useless and/or unsuited for them. See Jillian Gordon, *Why I'm Telling Some of My Students Not to Go to College*, PBS NEWSHOUR (Apr. 15, 2105, 1:23 PM), <http://www.pbs.org/newshour/updates/im-telling-students-go-college/>. This is an important factor to consider, and it is certainly a problem directly affecting student loan debtors. But the Bankruptcy Code is not the place to resolve this issue.

that self-imposed hardships do not qualify as undue hardships, or (2) adopting a modified and more streamlined common law test which would make the second prong dispositive and declare that self-imposed hardships do not satisfy the prong.

# I. THE *BRUNNER* TEST FOR UNDUE HARDSHIP

Two primary tests have emerged to assess and define “undue hardship.” The first is the *Brunner* Test.<sup>22</sup> The second is the “totality of the circumstances test,”<sup>23</sup> which is used in only two circuits<sup>24</sup> and will not be discussed heavily in this Note. The three prongs of the *Brunner* Test are:

- (1) [T]hat the debtor cannot maintain, based on current income and expenses, a ‘minimal’ standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.<sup>25</sup>

Debtors have the burden of proving all three prongs of the *Brunner* Test.<sup>26</sup>

## A. Prong One: Minimal Standard of Living

The first prong requires “that the debtor cannot maintain, based on current income and expenses, a ‘minimal’ standard of living for herself and her dependents if forced to repay the loans . . . .”<sup>27</sup> The first prong is essentially an income and expense analysis, which will determine whether the debtor’s budget has room for the student loan payments.<sup>28</sup> Once a “budget” is completed, the court analyzes the debtor’s budget to determine whether the debtor can maintain a minimal standard of living while also paying on the student loans.<sup>29</sup> Debtors must show that their finances are more than merely “tight,”<sup>30</sup> but they are not required to show they are

<sup>22</sup> This test originated in the Second Circuit in *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987) and is used in nine circuits. *Juliano*, *supra* note 15, at 496–97.

<sup>23</sup> This test emerged in the Eighth Circuit in *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702, 704 (8th Cir. 1981). *Sarah Edstrom Smith*, *supra* note 6, at 619.

<sup>24</sup> The Eighth Circuit has adopted the totality of the circumstances test, while the First Circuit tends to allow courts to use either approach. *Juliano*, *supra* note 15, at 497.

<sup>25</sup> *Brunner*, 831 F.2d at 396.

<sup>26</sup> *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995).

<sup>27</sup> *Brunner*, 831 F.2d at 396.

<sup>28</sup> Kevin J. Smith, *supra* note 3, at 258.

<sup>29</sup> *Id.* at 257–59.

<sup>30</sup> *In re Faish*, 72 F.3d at 306.

living below the poverty line,<sup>31</sup> nor do they need to prove "utter hopelessness."<sup>32</sup> Some courts use the income of the debtor at the time of bankruptcy, and some courts look at the past income of the debtor.<sup>33</sup> Over time, courts have established elements to define "minimal standard of living." Six essential considerations have been identified as: (1) housing, (2) electricity, gas, water, (3) groceries and certain cleaning products, (4) vehicles for transportation to work and other daily activities, such as medical appointments, (5) health and dental insurance, and (6) minimal recreation.<sup>34</sup>

It is extremely important to consider the amount of disposable income the debtor has. Currently, even if the debtor satisfies prong one, the circumstances still must be uncontrollable under prong two in order to maintain the integrity of the exception to discharge. A more prudent approach would be to evaluate the circumstances surrounding the debtor's inability to pay before considering whether the debtor can maintain a minimal standard of living while repaying the debt. This should be done to reflect the importance of control over the hardship in determining whether discharge is appropriate.<sup>35</sup>

### *B. Prong Two: Circumstances Likely to Persist*

The second and most important<sup>36</sup> prong of the *Brunner* Test requires that "additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans . . . ."<sup>37</sup> In other words, "a total incapacity [must be proven] in the future to pay debts for reasons not within [the debtor's] control."<sup>38</sup> There are essentially two aspects of this prong. First, a circumstance must exist which causes the debtor to be unable to make payments.<sup>39</sup> Second, this circumstance must be likely to exist for some time to come; in other words, the court must speculate about the future.<sup>40</sup> Both aspects

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<sup>31</sup> *Goodman v. U.S. Dep't of Educ. (In re Goodman)*, 449 B.R. 287, 293 (Bankr. N.D. Ohio 2011).

<sup>32</sup> *United Student Aid Funds, Inc. v. Nascimento (In re Nascimento)*, 241 B.R. 440, 445 (B.A.P. 9th Cir. 1999).

<sup>33</sup> Kevin J. Smith, *supra* note 3, at 258.

<sup>34</sup> *Douglas v. Educ. Credit Mgmt. Corp. (In re Douglas)*, 366 B.R. 241, 253 (Bankr. M.D. Ga. 2007).

<sup>35</sup> Courts are already treating the second prong as dispositive but this is not properly reflected in the Code or in the *Brunner* Test. See, e.g., *Brightful v. Pa. Higher Educ. Assistance Agency (In re Brightful)*, 267 F.3d 324, 331 (3d Cir. 2001).

<sup>36</sup> Courts have, for some time, regarded the second prong as the most important; without explicitly doing so, courts regard it as dispositive. See *In re Brightful*, 267 F.3d at 328, 331 (refusing to discuss the first and third prong in detail because the court regarded the second as decisive and most important).

<sup>37</sup> *Brunner v. N.Y. Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

<sup>38</sup> *In re Brightful*, 267 F.3d at 328 (quoting *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 307 (3d Cir. 1995)).

<sup>39</sup> *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 778 (7th Cir. 2002).

<sup>40</sup> *Id.* Speculation has been looked down upon, but this is precisely what the second prong requires: speculation about the future earnings and circumstantial disposition of the debtor. See *id.*

are essential—even if a circumstance existed which imposed an undue hardship, the courts would not grant a discharge if the circumstance would resolve itself in one month. The circumstances need to be unique and/or extraordinary,<sup>41</sup> and “may include, but are not limited to, illness, disability, a lack of useable job skills, or the existence of a large number of dependents . . . . [T]he most important factor in satisfying the second prong is that the ‘additional circumstances’ must be beyond the debtor’s control, not borne of free choice.”<sup>42</sup> This is not a new notion. Control has been regarded as extremely important by courts for some time—yet this has not been properly reflected in the Code.

There are endless circumstances that could qualify under the second prong of the *Brunner* Test, although the leading cause is physical illness.<sup>43</sup> Not only are physical illnesses and disabilities the most common forms of circumstances that meet the undue hardship test, they also serve as most vividly deserving of a discharge because they “can be easily shown to a court without much speculation.”<sup>44</sup> Additionally, courts have ruled that expert medical testimony is not required in order to meet the debtor’s burden of proving the circumstance,<sup>45</sup> making this prong that much easier to satisfy with a physical illness. Mental and emotional illnesses are included within this category,<sup>46</sup> albeit they are more difficult to diagnose, prove, and project into the future. For example, the *In re Nichols* court discharged the student loan debt for a person who had a history of psychiatric disorders even though the debtor was deemed “well educated and articulate.”<sup>47</sup> Similarly, the court in *In re Nixon* partially discharged the student loan debt of a debtor with Bipolar I Disorder, even though both the debtor and her doctors agreed that the disorder did not prevent her from working.<sup>48</sup>

Another popular and controversial circumstance is earning power and unemployment. In this regard, courts have the heightened duty of making predictions that they cannot make with accuracy.<sup>49</sup> This challenge could be curtailed by paying particular attention to the control that the debtor has over their situation. After all, “[t]he government is not twisting the arms of potential

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<sup>41</sup> *In re Brightful*, 267 F.3d at 328–29 (citing *Ballard v. Virginia ex rel. State Educ. Assistance Auth.* (*In re Ballard*), 60 B.R. 673, 675 (Bankr. W.D. Va. 1986)).

<sup>42</sup> *Barrett v. Educ. Credit Mgmt. Corp.* (*In re Barrett*), 487 F.3d 353, 359 (6th Cir. 2007) (internal citations and quotations omitted) (quoting *Oyler v. Educ. Credit Mgmt. Corp.* (*In re Oyler*), 397 F.3d 382, 386 (6th Cir. 2005)).

<sup>43</sup> Kevin J. Smith, *supra* note 3, at 262. Additionally, an empirical study concluded that debtors who were successful in discharging their student loans were more likely to have medical problems. *Iuliano*, *supra* note 15, at 498.

<sup>44</sup> Kevin J. Smith, *supra* note 3, at 262.

<sup>45</sup> *In re Barrett*, 487 F.3d at 360.

<sup>46</sup> Kevin J. Smith, *supra* note 3, at 263.

<sup>47</sup> *Nichols v. Regents of the Univ. of Cal.* (*In re Nichols*), 15 B.R. 208, 209 (Bankr. D. Me. 1981).

<sup>48</sup> *Nixon v. Key Educ. Res.* (*In re Nixon*), 453 B.R. 311, 319 (Bankr. S.D. Ohio 2011).

<sup>49</sup> Kevin J. Smith, *supra* note 3, at 264.



students.<sup>50</sup> Specifically, take the situation where a debtor chooses to work in a low-income career, like the debtor did in *In re Oyler*.<sup>51</sup> The court concluded, “[c]hosing a low-paying job cannot merit undue hardship relief.”<sup>52</sup> The court in *Oyler* emphasized the power that the debtor had over his choice to work as a pastor of a small start-up church in conjunction with his failure to make efforts to supplement his income.<sup>53</sup> Positions in noble careers do not automatically warrant a discharge, although they can qualify a debtor for certain repayment plans such as the Public Service Loan Forgiveness Program.<sup>54</sup> Likewise, a debtor who is lackadaisical in his efforts to obtain and maintain a job for which he is qualified will not satisfy the second prong of the *Brunner* Test,<sup>55</sup> and even under a totality of the circumstances analysis courts have referenced the debtor’s self-imposed limitations in this sort of situation.<sup>56</sup>

As should be immediately noted, the second prong of the *Brunner* Test does not explicitly mention the control that the debtor has over his circumstance.<sup>57</sup> Neither does the Code.<sup>58</sup> This fact is interesting because of how often courts have emphasized the importance of control.<sup>59</sup> It makes sense for the Code or applicable circuit test to reflect the importance of the nature of the circumstance. The presence of overwhelming regard to the control that the debtor has over the hardship is the first sign that this concern should be reflected more prominently in some manner. Additionally, a restructuring of the Code and/or the common law rule to include particular regard to the cause of the circumstance will streamline the process for courts and save all parties time and money. After all, courts often treat the second prong as dispositive regardless of the fact that this is not how the procedure is currently outlined.<sup>60</sup>

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<sup>50</sup> *In re Roberson*, 999 F.2d 1132, 1137 (7th Cir. 1993) (referring to the fact that students are not being forced into postsecondary education and student loan obligations).

<sup>51</sup> *Oyler v. Educ. Credit Mgmt. Corp.* (*In re Oyler*), 397 F.3d 382, 386 (6th Cir. 2005).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Public Service Loan Forgiveness*, FED. STUDENT AID: AN OFF. OF THE U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service> (last visited Sept. 23, 2016).

<sup>55</sup> *Educ. Credit Mgmt. Corp. v. Jespersen*, 571 F.3d 775, 782 (8th Cir. 2009).

<sup>56</sup> *Id.* at 781, 782.

<sup>57</sup> See *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

<sup>58</sup> See 11 U.S.C. § 523(a)(8) (2016).

<sup>59</sup> Control is emphasized in the following cases, among many others: *Jespersen*, 571 F.3d at 783 (J. Smith, concurring); *Barrett v. Educ. Credit Mgmt. Corp.* (*In re Barrett*), 487 F.3d 353, 359 (6th Cir. 2007); *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993); *Connor v. Ill. State Scholarship Comm’n* (*In re Conner*), 89 B.R. 744, 749 (Bankr. N.D. Ill. 1988) (holding that opting to send children to private school is a self-imposed hardship); *Fischer v. State Univ. of N.Y.* (*In re Fischer*), 23 B.R. 432, 434 (Bankr. W.D. Ky. 1982) (without explicitly saying control); *Perkins v. Vt. Student Assistance Corp.* (*In re Perkins*), 11 B.R. 160, 161 (Bankr. D. Vt. 1980) (holding that buying a new car is a self-imposed hardship that did not warrant discharge).

<sup>60</sup> See *Brightful v. Pa. Higher Educ. Assistance Agency* (*In re Brightful*), 267 F.3d 324, 330–31 (3d Cir. 2001).

*C. Prong Three: Good Faith Effort to Repay*

The third prong of the *Brunner* Test requires “that the debtor has made good faith efforts to repay the loans.”<sup>61</sup> Part of this test considers how much time has elapsed between the time that the loans became due and the time that the debtor filed for bankruptcy.<sup>62</sup> This is logical because the purpose of the exception to student loans in § 523(a)(8) is to prevent the debtor from incurring student loan debt and shortly thereafter filing for bankruptcy and discharging that debt.<sup>63</sup> Therefore, some amount of time is required to pass before a student loan can be considered for discharge, in addition to the requirement in the second prong that the undue hardship be expected to last indefinitely. The more time that passes, and the more payments a debtor makes or attempts to make, the stronger the debtor’s request for discharge will be.<sup>64</sup> An example for which a lack of good faith to repay is clear appears in *Brunner* itself. In *Brunner*, the debtor requested a student loan discharge a mere ten months after graduating, within a month of the date of the first required payment, without having made a payment, and without first requesting a deferment.<sup>65</sup>

The third prong may not be as important as the *Brunner* Test makes it seem. Even if a debtor makes no payments whatsoever, they can still pass the third prong and be eligible for a discharge.<sup>66</sup> A Sixth Circuit case in 2007 permitted the discharge of student loans for a debtor who had done this very thing.<sup>67</sup> That court took this course of action because of the severe and uncontrollable medical illnesses that the debtor had—the highest level of Hodgkin’s disease and avascular necrosis, which caused him constant and severe pain, disallowing him to do much more than move a computer mouse with his hand.<sup>68</sup> Granted, time had passed between the debtor’s payments becoming due and his filing for bankruptcy, but the time was only two years.<sup>69</sup> As is demonstrated by this case, it is again clear that the courts are more concerned with prong two, the circumstances which cause a debtor’s inability to repay. There have been many proposals requiring a certain amount of years to pass during this time,<sup>70</sup> but the scope of this Note is to shed light on the fact that the second prong is by far the most important and this fact should be reflected more appropriately. Only after a debtor proves that they lack control over the

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<sup>61</sup> *Brunner*, 831 F.2d at 396.

<sup>62</sup> Kevin J. Smith, *supra* note 3, at 266.

<sup>63</sup> Harris, *supra* note 16.

<sup>64</sup> Kevin J. Smith, *supra* note 3, at 266.

<sup>65</sup> *Brunner*, 831 F.2d at 397.

<sup>66</sup> See *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 365–66 (6th Cir. 2007).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 357.

<sup>69</sup> *Id.* at 356–57 (debtor filed for bankruptcy December 28, 2001, after he incurred the debt while obtaining his degree in 1999).

<sup>70</sup> One proposal was for ten years. Kevin J. Smith, *supra* note 3, at 271.

hardship should a court analyze efforts to make payment. But this Note will recommend that the most practical course of action is to ignore this prong all together, because if a debtor has such a dire need for discharge under prong two, the court will likely not be swayed by the fact that he has not made payments or enrolled in an alternative payment plan.<sup>71</sup>

In *In re Hornsby*, the debtors received several deferments and forbearances but defaulted before making a single payment.<sup>72</sup> Despite the fact that they had not made a single payment on the student loans, the bankruptcy court decided to partially discharge the loans, mainly focusing on the debtors' lack of disposable income under prong one.<sup>73</sup> Although the court focuses on prong one, this opinion furthers the theory that prong three is not, and should not be, dispositive. The fact that a debtor can fail to make even a single payment seriously erodes the purpose behind prong three. The goal is that the person has tried for some time to pay down the loan. Should a deferment or forbearance be considered an "attempt to pay" at all? The Sixth Circuit seems to think so, and this is troubling.

## II. UNCONTROLLABLE HARDSHIPS

The next two Parts of this Note will focus on bringing to life the argument that control should be the main focus in student loan discharge cases. The issue of student loan discharge in bankruptcy is highly fact-driven, so these sections will be comprised of case analyses. Not surprisingly, most of the cases for which discharge is allowed involve a serious medical condition. This particular category of cases, those for which a hardship should result in discharge, should present very little debate as to whether the debtor deserves to receive the discharge. Their circumstances are clearly intense, uncontrollable, and unlikely to improve in the foreseeable future.

First, consider *In re Barrett* in more detail.<sup>74</sup> In this case, the debtor had over \$94,000 in student loan debt.<sup>75</sup> He earned master's degrees in Health Administration and Business Administration in 1999, after which he was diagnosed with the highest level of Hodgkin's disease, a type of cancer.<sup>76</sup> It was during his chemotherapy that his student loans became due.<sup>77</sup> After nine months of chemotherapy, the debtor was too weak to work and earn any income, so he filed for Chapter 7 bankruptcy because of his accumulating medical bills.<sup>78</sup> A year after

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<sup>71</sup> This would save time, money, and simplify the process. Of course, some courts are narrowing the issues on their own, but formally streamlining the process and emphasizing the most important aspect will allow all parties to understand the process better and will allow debtors to set themselves up for success in these claims.

<sup>72</sup> *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 435 (6th Cir. 1998).

<sup>73</sup> *Id.* at 438.

<sup>74</sup> *In re Barrett*, 487 F.3d 353.

<sup>75</sup> *Id.* at 356.

<sup>76</sup> *Id.* at 356-57.

<sup>77</sup> *Id.* at 357.

<sup>78</sup> *Id.*

filing, the debtor was diagnosed with avascular necrosis, a condition which causes bones to die.<sup>79</sup> Because of this condition, the debtor suffered from “massive pain” in multiple areas of his body and required multiple surgeries.<sup>80</sup> He testified that he could not “even hold a coffee cup with [his] right hand,” and expected to have more surgeries.<sup>81</sup> Not surprisingly, the debtor testified that he could not find employment because of his medical conditions.<sup>82</sup>

The court declared that the debtor satisfied the second prong of the *Brunner* Test because his “financial woes are not the result of his own choice of profession, but rather are due to circumstances beyond his control.”<sup>83</sup> The court also noted that he satisfied the first prong in that his monthly income totaled \$868 and his monthly expenses were \$3,575.<sup>84</sup> The final result is consistent with an analysis that takes control of the hardship under the highest consideration. Note that prong three is likely of no consequence in this case. The debtor did not make any payments toward his student loan. Although the court gives him credit for having received deferments and forbearances, his situation was so hopeless and beyond his control that the court likely would have taken the same course of action had he defaulted instead of deferred.

In *In re Bagley*, the debtor stopped working because of a difficult pregnancy.<sup>85</sup> The baby was born with serious respiratory problems and was kept in intensive care for some time after birth.<sup>86</sup> The debtor and her husband lived near the welfare level, her husband’s income was not expected to increase, and she could not work because the child required care for which a babysitter could not provide.<sup>87</sup> Additionally, the court noted that the debtor did not anticipate receiving or inheriting any kind of wealth in the future.<sup>88</sup> The court did not discuss control, although such a discussion would have been helpful and revealing since the debtor’s circumstances were not self-imposed and would exist into the foreseeable future. The debtor in this case, as in many others, had not made a single payment toward her student loans.<sup>89</sup> Again, this shows that the third prong is an unnecessary burden on the court when the debtor can prove that the circumstance they sits in is serious enough, out of their control, and will persist into the foreseeable future.

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 363.

<sup>84</sup> *Id.* at 357–58.

<sup>85</sup> *Conn. Student Loan Found. Inc., v. Bagley (In re Bagley)*, 4 B.R. 248, 249 (Bankr. D. Ariz. 1980).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 251.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 251.

## III. SELF-IMPOSED HARDSHIPS

For the circumstances in this category, it should be clear that the debtor does not qualify for discharge under the current *Brunner* Test. The reasons behind denying discharge for these loans can be justified solely by referencing control over the hardship; although, courts will use many other justifications for their decision. Not surprisingly, many of the cases within this category involve a debtor claiming that they are unable to find a job. Failure to find a well-paying job presents particularly interesting legal challenges.

From a control standpoint, the inability to find a job should never constitute an undue hardship, unless there are additional circumstances inhibiting the job hunt, such as the debilitating physical disabilities that the debtor in *Barrett* suffered—which did not allow him to hold a job that required much more than moving a computer mouse.<sup>90</sup> Many courts agree with this conclusion.<sup>91</sup> As can be imagined, allowing discharge for the mere inability to find a job would open the door to a robust number of claims for student loan discharge that, if allowed, would contravene the purpose of § 532(a)(8). If courts do not adequately account for control over the debtor's situation, the door will be opened to discharge student loans for anyone who loses a job due to a recession, because of commercial changes, or even in situations where one is fired. Of course, the loss of a job in these situations is most likely outside of the control of the debtor, but the ability to find a new job, even if in a different field, may be within the control of the debtor provided that they are not disabled, elderly, or too unhealthy to work. The loss of a job under many circumstances does not present a situation of hopelessness—which is required under prong two.

*In re Oylar*<sup>92</sup> depicts very well the concept of control over hardships, and also serves as a clear example of the unimportance of prong one and three of the *Brunner* Test. In this case, the debtor held a bachelor's and master's degree, was a former salesman and engineer, and formerly owned a business, but was only earning \$10,000 per year as the pastor of a Jewish church that he founded.<sup>93</sup> Despite the fact that the debtor was making regular \$50 payments to his student loans through his Chapter 13 filing, the debtor satisfied the first prong regarding ability to pay from a budgeting standpoint—but the court refused to discharge his

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<sup>90</sup> *Barrett v. Educ. Credit Mgmt. Corp.* (*In re Barrett*), 487 F.3d 353, 357 (6th Cir. 2007).

<sup>91</sup> See, e.g., *Healey v. Mass. Higher Educ.* (*In re Healey*), 161 B.R. 389, 395 (E.D. Mich. 1993) ("A resolute determination to work in one's field of dreams, no matter how little it pays, cannot be the fundamental standard from which 'undue hardship' . . . is measured."). A debtor must do everything within their power to improve their financial situation and look for better employment. See *Storey v. Nat'l Enter. Sys.* (*In re Storey*), 312 B.R. 867, 872–73 (Bankr. N.D. Ohio 2004). A debtor is required to explore work in areas outside their expertise or training. See *Brightful v. Pa. Higher Educ. Assistance Agency* (*In re Brightful*), 267 F.3d 324, 329 n. 4 (3d Cir. 2001); see also *Greco v. Sallie Mae Servicing Corp.* (*In re Greco*), 251 B.R. 670, 677 (Bankr. E.D. Pa. 2000) ("[d]ebtor has not demonstrated any efforts to seek employment in another field").

<sup>92</sup> *Oylar v. Educ. Credit Mgmt. Corp.* (*In re Oylar*), 397 F.3d 382 (6th Cir. 2005).

<sup>93</sup> *Id.* at 384.

student loans because he did not qualify under prong two of the *Brunner* Test.<sup>94</sup> In particular, the court discussed the importance of the control that the debtor had over his circumstance regarding his career choice.<sup>95</sup> The court stated, “Oyler’s choice to work as a pastor of a small start-up church cannot excuse his failure to supplement his income so that he can meet knowingly and voluntarily incurred financial obligations. By education and experience he qualifies for higher-paying work and is obliged to seek [that] work . . . .”<sup>96</sup>

The Seventh Circuit posited several additional aspects of a claim for student loan discharge due to difficulty obtaining a job.<sup>97</sup> As a forty-five year old man, this debtor went back to school for his master’s degree in psychology.<sup>98</sup> Prior to starting classes, he was arrested for felony possession of cocaine.<sup>99</sup> After being convicted of the felony charge, the debtor feared that the conviction would render him unable to complete a 3,000 hour certification program required for his degree; due in part to that fear, the debtor failed to finish his coursework.<sup>100</sup> During the time he was taking these classes, however, the debtor incurred \$76,000 worth of student loan debt and never attempted to make a single payment.<sup>101</sup> The court refused to discharge the debtor’s student loans primarily for failing to satisfy the second prong of the *Brunner* Test.<sup>102</sup> In the process, the court made several bold statements that other courts have failed to make. One of these statements was a recognition that the debtor “[p]resumably . . . has some source of revenue to maintain his claimed drug dependency,” in response to the debtor’s claim that his primary reason for non-payment was that he suffered from substance abuse.<sup>103</sup>

The court also shed light upon whether the hardship’s inception was before or after incurring the debt. The court stated, “[b]y his own admission, these circumstances *predated* his attendance at UW Stout and his acceptance of the responsibility of these student loans. By returning to graduate school at the age of 45 and voluntarily assuming the debt, Goulet must have believed that he had future earnings potential.”<sup>104</sup> Under a control theory, a circumstance which renders a debtor unlikely to be able to pay a student loan *not yet incurred* should create a much stronger presumption against discharge. Such a situation depicts a particular variety of affairs, the sort for which the exception to student loans was created. If a debtor, like the one in *Goulet*, suffers from a hardship *before* incurring the debt, which ends up being *the very reason* for which he does not complete his degree, the

<sup>94</sup> *Id.* at 384, 386.

<sup>95</sup> *Id.* at 386.

<sup>96</sup> *Id.*

<sup>97</sup> See *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773 (7th Cir. 2002).

<sup>98</sup> *Id.* at 776, 779.

<sup>99</sup> *Id.* at 776.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 779.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (emphasis added).

debt almost appears like it was fraudulently incurred.<sup>105</sup> Finally, many courts make statements regarding the debtor being uneducated or unintelligent, but the court in *Goulet* brings to light the reality of the situation by stating: "Goulet is an intelligent man. The record does not reveal that he lacks usable job skills or that he is hindered by a limited education. *In fact, because of the loans, he received an excellent education.*"<sup>106</sup>

Courts also appear to be resistant toward discharging student loans when a debtor claims that they cannot pay due to suffering from alcoholism. Alcohol use disorder is considered a disease,<sup>107</sup> yet the courts view this impairment differently. In particular, these cases use the term "insurmountable" to declare that the debtor has not satisfied prong two of the *Brunner Test*.<sup>108</sup> Insurmountability appears to directly reflect the amount of control that the debtor has in overcoming his addiction. For example, one court believed that Congress did not contemplate drug addiction when the Code was written, and did not view the chance of relapse as enough to warrant discharge.<sup>109</sup> Courts view most results of the disease (temporal career restrictions or revocation of driving licenses) as temporary impairments that the debtor has the power to overcome.<sup>110</sup> Is this sound under a control theory? There is a strong argument for answering this question in the affirmative.

That is not to say that there may not be a situation in which an alcoholic is so deeply affected by their addiction that they will not be able to function properly in society. But consider alcoholism from its inception. The debtor is not forced to drink during the time that he or she is becoming an alcoholic—this is a decision that is within their complete control. But even after addiction has ensued, barring proof that the debtor is in a permanent, debilitating physical state because of the alcoholism, the debtor has control over their efforts to obtain help, seek treatment, and hold a job. Overall, the debtor had the choice to begin drinking, and has the choice to obtain treatment. One court discharged student loans because of alcoholism in *In re Nichols*. Unfortunately, the court did not elaborate on the physical state of the debtor other than to provide that the debtor "will be unable to function at more than a subsistence [sic] level for a substantial period and perhaps for the rest of his life."<sup>111</sup>

For comparison purposes, it is helpful to include an example of medical conditions which the court does not, and should not, see as sufficiently debilitating

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<sup>105</sup> Fraudulently incurred debts are automatically non-dischargeable. 11 U.S.C. § 523(a)(2)(A) (2016).

<sup>106</sup> *Goulet*, 284 F.3d at 779 (emphasis added).

<sup>107</sup> See *Alcohol-Related Disorders*, in AMERICAN PSYCHIATRIC ASSOCIATION: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Am. Psychiatric Ass'n et al. eds., 5th ed. 2013).

<sup>108</sup> See *Roach v. United Student Aid Fund, Inc. (In re Roach)*, 288 B.R. 437, 446 (Bankr. E.D. La. 2003); see also *Roberson v. Ill. Student Assistance Comm'n (In re Robertson)*, 999 F.2d 1132, 1137 (7th Cir. 1993).

<sup>109</sup> See *In re Roach*, 288 B.R. at 446.

<sup>110</sup> See, e.g., *id.*; see also *In re Roberson*, 999 F.2d at 1137.

<sup>111</sup> *Nichols v. Regents of the Univ. of Cal. (In re Nichols)*, 15 B.R. 208, 209 (Bankr. D. Me. 1981).

so as to qualify under prong two of the *Brunner* Test. One debtor in the Sixth Circuit claimed that she was unable to work because she had lost her sense of taste and could not cope.<sup>112</sup> In addition to several emotional problems,<sup>113</sup> the debtor claimed to have sustained colorectal surgery—which she attests to be the source of her loss of taste.<sup>114</sup> The court was not fooled by this and simply concluded that the debtor’s loss of taste did not have an effect on her finding work, and that this could not stand as an excuse for failing to pay her student loans.<sup>115</sup>

#### IV. HOW AND WHY SHOULD SELF-IMPOSED HARDSHIPS BE NON-DISCHARGEABLE?

##### A. *Why is Control Important?*

Because self-imposed hardships for which a debtor has complete control serve such a disservice to the student loan exception from discharge, something must be done to emphasize the importance of those hardships. It is true that bankruptcy is remedial in nature. When one files for bankruptcy, the court is essentially discharging loans for which the debtor has control over incurring, and for which the debtor may have been irresponsible in incurring. But student loans present a unique challenge. In some instances, it is necessary to take the debtor’s poor decision-making into account and therefore reposition the remedial nature of bankruptcy.

Not only is this repositioning currently being done with respect to student loans, but it has also been done in other areas of the Code. Take for example the exclusion to discharge in 11 U.S.C. § 523(a)(2)(C)(i)(I) (2016). This provision states that “consumer debts owed to a single creditor and aggregating more than \$650 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable.”<sup>116</sup> This provision was added to the Code in order to reflect the “sensible belief that credit card issuers deserve some protection against the excesses of a ‘credit card spree’ that allowed debtors to acquire expensive luxuries on the eve of bankruptcy . . . .”<sup>117</sup> In the same manner, student loan creditors, and our government (which backs those loans) deserve strict protection against the abuse of the bankruptcy and student loan system from debtors attempting to discharge student loans for which they incurred haphazardly.

<sup>112</sup> *Tirch v. Pa. Higher Educ. Assistance Agency* (*In re Tirch*), 409 F.3d 677, 681–82 (6th Cir. 2005).

<sup>113</sup> The debtor claimed to have ADD, anxiety, and depression. *Id.* at 679.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 681–82.

<sup>116</sup> 11 U.S.C. § 523(a)(2)(C)(i)(I) (2016).

<sup>117</sup> WILLIAM D. WARREN & STEVEN D. WALT, PAYMENTS AND CREDITS 155 (Robert C. Clark et al. eds., 9th ed. 2013).



The bankruptcy system's main method of checking for abuse is through the "means test."<sup>118</sup> The means test is essentially a different kind of income and expense analysis. As long as the debtor's income is lower than the state median, they will qualify for a Chapter 7 bankruptcy filing.<sup>119</sup> Otherwise, they will be required to file for a Chapter 13 bankruptcy, which accounts for higher income earners and requires a repayment period before discharge.<sup>120</sup> Once the debtor qualifies for either Chapter 7 or Chapter 13, there is no analysis made as to whether the debtor made good faith efforts to repay or whether they have likely-to-persist circumstances that hinder their ability to pay, as is done in an undue hardship analysis under the *Brunner Test*.<sup>121</sup>

The legislature purposefully decided to treat student loans differently than other types of consumer debt by excepting them from discharge.<sup>122</sup> The legislature recognized, though, that simply excepting student loans from discharge might not be appropriate in all situations. Therefore, a small door was left open to those debtors for which being required to repay the student loans would impose an undue hardship.<sup>123</sup> Why pay particular attention to the control that the debtor has over his circumstance? And why reflect that concern in an explicit, meaningful way? Simply because courts say that it is the most important factor. Luckily for us, this is common sense. As recognized by Judge Kanne in the Seventh Circuit, this is one category of debt for which we should place responsibility on the debtor:

Congress' decision to increase the availability of higher education through student loans does not necessarily equate to a decision to insure the future success of each student taking advantage of that opportunity. The government guarantees repayment of the loan to the private lender so that those who, because of their current wealth and future earning potential would not be eligible to receive any financing or only financing at a higher rate of interest, may nonetheless receive an education.

The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; absent an expression to the contrary, the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the

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<sup>118</sup> See 11 U.S.C. § 707(b)(2) (2016).

<sup>119</sup> *Id.* § (b)(6).

<sup>120</sup> *Id.*

<sup>121</sup> See *supra* Part I.

<sup>122</sup> 11 U.S.C. § 523(a)(8).

<sup>123</sup> *Id.*

student, not the taxpayers, must accept the consequences of the decision to borrow.<sup>124</sup>

Why allow a debtor discharge from student loan obligations, which has been expressly disallowed? And why, when they have placed themselves in the situation for which their inability to pay exists, and when these loans are so easy to obtain?

Particularly because student loans are so easily obtainable, their strict treatment in bankruptcy should be maintained. As an alternative to always allowing student loan discharge and forcing lenders and higher educational institutions to drastically alter their practices, accounting for personal choice in student loan discharge considerations maintains the system's purpose more easily. If lenders were forced to analyze more stringently the ability of a borrower to repay because of the risk that the loans would be effortlessly dischargeable, student loans would not be available to nearly as many people. Under our current system, nearly all applicants are approved for financing<sup>125</sup> and they should therefore be held to a higher standard in repayment. Accounting for control over the hardship places the responsibility directly onto the borrower to repay the debt—which is a practice that does not occur with other forms of consumer debt that are more difficult to obtain. If the United States wants to maintain its “American Dream” status quo and further the notion that all citizens can earn a college education, making sure that student loans are extremely difficult to discharge is an irreplaceable necessity. Otherwise, only students with an apparent ability to repay will be approved.

### *B. Examples of Cases That Would be Reversed if Analyzed Under a Control Theory*

There are many cases that clearly reflect the injustice of failing to recognize the control that a debtor has over the circumstances which render them unable to pay their student loans; and under a control theory, these cases would turn out differently. First, consider *In re Hornsby*.<sup>126</sup> In that case, the debtors, a married couple with three children, incurred over \$30,000 in debt, mostly comprised of student loans.<sup>127</sup> Both studied business and computers for a period of five years and attended various state colleges. Neither graduated.<sup>128</sup> The debtors received several deferments and forbearances. Nonetheless, the debtors defaulted before making

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<sup>124</sup> *Roberson v. Ill. Student Assistance Comm'n (In re Robertson)*, 999 F.2d 1132, 1136–37 (7th Cir. 1993).

<sup>125</sup> *Who Gets Aid*, FED. STUDENT AID: AN OFF. OF THE U.S. DEPT OF EDUC., <https://studentaid.ed.gov/sa/eligibility#basic-criteria> (last visited Sept. 23, 2016) (“Most people are eligible for financial aid for college or career school.”) (indicating basic eligibility criteria which notes nothing indicative of ability to repay and showing that there is no age limit).

<sup>126</sup> *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433 (6th Cir. 1998).

<sup>127</sup> *Id.* at 435.

<sup>128</sup> *Id.*

their first payment.<sup>129</sup> During the discharge proceedings, the husband was making \$6.53 per hour and working occasional over-time at AT&T, and the wife had just transferred jobs in order to become the director of a childcare facility, after which they had a high-end monthly surplus of close to three hundred dollars.<sup>130</sup> Although the Sixth Circuit suggested institution of a partial discharge on remand instead of a full discharge,<sup>131</sup> the debtors had sufficient control over their circumstances such that discharge should have been disallowed entirely.

This Note does not include a discussion of partial discharge, but what should be recognized is that the debtors had enough control over their situation to make discharge contrary to the student loan exception's purpose. First, the bankruptcy court ignored the sizeable budget surplus available to these debtors.<sup>132</sup> The debtors in *Hornsby* had a surplus of two to three hundred dollars each month,<sup>133</sup> compared to the deficit of \$2,700 in *Barrett*.<sup>134</sup> More importantly, compare the reason for the deficit in *Barrett* to the reason for the surplus in *Hornsby*. In *Hornsby*, the bankruptcy court expressed what seems to be a personal opinion that the debtors had understated their expenses.<sup>135</sup> Second, the bankruptcy court did not inquire into or require documentation of the "unexpected expenses" referred to by the debtor which was an excuse for not paying; and it failed to address the presence of money spent on excessive telephone and electric use, meals eaten out, and expenditure on cigarettes, none of which fit into the factors from *In re Douglas*.<sup>136</sup>

The Sixth Circuit also noted that the debtors were not unhealthy or aged.<sup>137</sup> The court recognized too that the debtor's poor "management of their debts do not meet any test of undue hardship such to justify discharge of their student loan obligations."<sup>138</sup> Although the Sixth Circuit's discussion surrounds prong one of the *Brunner* Test, the debtors did not have any unbearable circumstances that kept them from paying. Unlike other courts have concluded, it is clear that the debtors did not take all steps necessary to minimize their expenses.<sup>139</sup> They had control over the tightening of their budget and the increasing of their income, neither of which were hindered by any uncontrollable circumstance such as a serious medical illness.

Another troublesome case is *In re Cheesman*.<sup>140</sup> In this case, the dissent logically analyzes the debtors' ability to repay by concluding:

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 435-36.

<sup>131</sup> *Id.* at 440.

<sup>132</sup> *Id.* at 438.

<sup>133</sup> *Id.* at 435-36.

<sup>134</sup> *Barrett v. Educ. Credit Mgmt. Corp.* (*In re Barrett*), 487 F.3d 353, 357-58 (6th Cir. 2007).

<sup>135</sup> See *In re Hornsby*, 144 F.3d at 438.

<sup>136</sup> *Id.*; *Douglas v. Educ. Credit Mgmt. Corp.* (*In re Douglas*), 366 B.R. 241, 253 (Bankr. M.D. Ga. 2007).

<sup>137</sup> *In re Hornsby*, 144 F.3d at 438.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See *Cheesman v. Tenn. Student Assistance Corp.* (*In re Cheesman*), 25 F.3d 356 (6th Cir. 1994).

The Cheesmans are not disabled. They are not ill. They are not elderly. They are both college trained. At the time of the bankruptcy hearing, Mr. Cheesman held a job, and he testified that there was a possibility of a promotion with his current employer. Mrs. Cheesman is qualified to tutor or substitute teach, as she did prior to the filing of the Chapter 7 petition. These circumstances are inapposite of those in cases in which a court has found “additional circumstances” to exist.<sup>141</sup>

The dissenting opinion then went on to cite to several situations for which discharge was appropriate, such as that in *In re Diaz*, where the hearing-impaired debtor failed to receive her degree because of illnesses which kept her out of class for one or two months at a time, could not work for more than a half-day because of physical problems, and had a child with dental problems who was required to attend a psychiatric clinic.<sup>142</sup>

The majority in *Cheesman* ignored the facts cited by the dissent, and, with specific regard to the debtors’ circumstances, the court said that there was no guarantee that the debtors would get promotions and find jobs as they hoped to.<sup>143</sup> Because the government does not guarantee a return on investment from a college education, and definitely does not guarantee future promotions and job prospects, the government should not have been required to foot this bill. The Cheesmans had complete control over their ability to earn more money and to put the surplus in their budget to proper use. It is true that Mr. Cheesman’s promotion was not guaranteed, but testimony from a debtor himself indicating a promotion as a possibility should be a red flag against discharge. Moreover, the Cheesmans suffered from no additional circumstances that disallowed them to continue to work, find new jobs, or be promoted. When the court decided as it did, it incorrectly emphasized the control the debtor had over *how much his current employer paid him*, not on the control the debtor had *to find or keep a good-paying job*. This focus skews the real issue.

Both husband and wife held bachelor’s degrees, and with a bachelor’s degree in English and experience teaching, the majority’s argument that the wife could not get a better job than that of a teacher’s aide is highly unsatisfactory and entirely too subjective and speculative.<sup>144</sup> Under a control analysis, the debtors in this case would not have been deserving of discharge because they were in full control over their ability to utilize their budget surplus and keep and find jobs that would have paid them well. Like in *Hornsby*, the debtors did not suffer from any conditions

<sup>141</sup> *Id.* at 362 (Guy, J., dissenting).

<sup>142</sup> *Id.* (citing *Diaz v. N.Y. State Higher Educ. Servs. Corp. (In re Diaz)*, 5 B.R. 253, 253–54 (Bankr. W.D. N.Y. 1980)).

<sup>143</sup> *Id.* at 360.

<sup>144</sup> *See id.* at 358, 360.

outside of their control which rendered them unable to find or keep a decent job. With this decision, the Sixth Circuit made a travesty of justice.

Yet again is a case that completely disregards the fact that the debtor has control over his tough situation: *In re Clay*.<sup>145</sup> This case presents two troublesome conclusions. First, it ruled that the debtor's voluntary support of his parents supported his request for student loan discharge.<sup>146</sup> The debtor's parents were retired and unemployed, and the opinion states that the "parents depend upon him for their livelihood."<sup>147</sup> The court makes no mention of affirmative evidence that the parents are legally dependent on the debtor—and this would seem to be necessary. A moral obligation to take care of one's parents should not be justification for failing to meet financial obligations that are non-dischargeable without proof of hopeless circumstances of the debtor himself.

Second, and more concerning, the court stated that a substantial justification for discharge was that the debtor's education provided him with little benefit.<sup>148</sup> It has already been stated, and is common sense, that the government does not guarantee the fruits of one's educational pursuits. Neither do universities. Along with this argument, the court uses peer pressure *to enter into* a student loan agreement as a reason why a debtor is *deserving of discharge*. This is highly contrary to the integrity behind the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act and the exception to student loans in the Code. In fact, the court itself cites to a House Report which justifies the Act on evidence that financial advisors had been counseling debtors to file for bankruptcy in order to discharge their student loans.<sup>149</sup> Like peer pressure or advice to file for bankruptcy is met with resistance by the drafters, peer pressure for entering into a student loan in the first place cannot alternatively serve as a justification for discharge. Allowing pressure from others to enter into student loans to justify failing to meet repayment obligations is directly contrary to the very reason for instituting the student loan discharge—the pressure from financial advisors to discharge student loan debt through bankruptcy.

Not only are the arguments above unsatisfactory, but the debtor in *Clay* had recently received a 9% raise.<sup>150</sup> The court brought attention to the fact that the debtor's job was not in jeopardy, but decided on its own that his current job was not good enough. There was no discussion about the debtor's ability to find a higher paying job with another company and no allegations that he would not be able to work in other fields. This was purposeful ignorance as to the debtor's ability to control the amount of money he made—which was fully intact.

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<sup>145</sup> *Clay v. Westmar Coll. (In re Clay)*, 12 B.R. 251 (Bankr. N.D. Iowa 1981).

<sup>146</sup> *Id.* at 254.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 255.

<sup>149</sup> *Id.* at 253.

<sup>150</sup> *Id.* at 254.

*C. Recommendations for Reflecting Control of the Hardship*

There are several ways that self-imposed hardships could and should be taken into account in a more purposeful manner. First, the legislature could include a definition of “undue hardship” in the Code for purposes of 11 U.S.C. § 523(a)(8), which would declare that self-imposed hardships for which the debtor has control do not qualify. Courts repeatedly point out that this definition is non-existent and suggest that it would be incredibly helpful in order to reflect the legislative intent behind the exception to discharge. As is apparent from the case analysis in this Note, the first and third prongs of the *Brunner* Test are not nearly as important as a second. With regard to the third prong, it tends to be ignored. With regard to the first prong, it should remain and is not in dire need of revision, but should be considered last. Therefore, a more meaningful and swift modification to current practices would be to simply incorporate a control-packed definition of “undue hardship” in the Code.

Not only is control an important part of the analysis, but a lot of courts expressly refer to control in their analysis. The harm comes from those cases such as *Hornsby*, *Cheesman*, and *Clay* that do not make any meaningful discussion of control over the hardship, leading to an undeserving discharge. The *Brunner* Test does a decent job at laying out a workable analysis. But to wait for the Supreme Court to take this matter into their own hands and establish it as national precedent would be burdensome, and, of course, it is not guaranteed. The legislature can resolve the matter more efficiently, and it can do so in a way that would apply to all courts immediately. A suggested definition of “undue hardship” is as follows:

Student loan obligations impose an undue hardship upon a student loan debtor when:

- a. the debtor’s ability to pay has been hindered by a circumstance for which the debtor has no control over alleviating,
- b. which is likely to persist into the foreseeable future, and
- c. the payment for which would place the debtor in a monthly budget deficit.

This suggestion would be subject to modification, but there are several things that this definition does: (1) it maintains the most important parts of the *Brunner* Test—a long-lasting circumstance and budget impossibility—and could preempt the *Brunner* Test (and other tests) as a more uniform approach; (2) in that respect, it eliminates the third prong good faith effort to repay, which would alleviate the heavy debates with regard to whether enrolling in alternative repayment plans constitutes ‘repayment’ at all, and it respects the fact that this part of the *Brunner*

Test has been ignored; and (3) most obviously, it expressly mentions "control."

Alternately, the courts could adopt a modified, more streamlined test—although this might require intervention by the Supreme Court. As mentioned above, the inclusion of most parts of the *Brunner* Test are not specifically harmful. What is most important is that *lack of control* of the hardship must be required. A more efficient test would also dispose of the third prong, which has been demonstrated to be of little clout with the courts. Then, only if a controlled circumstances test is passed would the court analyze ability to pay. This course of action, versus legislative intervention, could do what the legislature might not be able to do with a simple definition—remove the parts of the *Brunner* Test that waste time and distort the imperative pieces of the student loan discharge analysis.

An important issue requiring brief attention is the timing of the circumstance. There is something unique about a situation in which a debtor has an existing circumstance *prior* to incurring student loan debt versus a circumstance that arises *after* the debt has already been incurred. This shifts the control analysis. In the first situation, there needs to be a discussion of *control over incurring debt, which one suspects will be difficult or impossible to pay*, rather than in the latter situation, which involves *control over the circumstances which make repayment difficult*.<sup>151</sup> The *Roach* court stated succinctly that an "additional circumstance" is one which was "either not present when the debtors applied for the loans or has since been exacerbated. Otherwise, the debtor could have calculated that factor into its cost-benefit analysis at the time the debtor obtained the loan."<sup>152</sup> For obvious reasons, a circumstance that existed before incurring the debt should presumptively fail the undue hardship test. The burden should be on the debtor to prove that it did not exist before the incurring of the debt, or that it had since exacerbated. Because this involves control, control of the debtor to incur a debt for which he suspects he cannot pay, it is of importance in this Note. Additionally, it falls dangerously close to fraudulent incurrence of a debt, debts of which are non-dischargeable. Any modification to current student loan discharge practices should note the importance of timing of the circumstance.

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<sup>151</sup> In *Goulet*, remember that as reason for nonpayment, the debtor cited to his criminal record as justification for why he could not complete his degree and get a good job in his field of study. This criminal record was incurred prior to enrolling in the program. Luckily, the court took that into account when deciding not to discharge his loans, but this can be hard to catch. *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 778–79 (7th Cir. 2002). Note also that this situation probably encompasses a situation for which a debtor purports that inability to repay has resulted from their enrolling in a useless degree program which has little to no job prospect attached to it. This is something that the debtor knows or should know *beforehand*.

<sup>152</sup> *Roach v. United Student Aid Fund (In re Roach)*, 288 B.R. 437, 445 (Bankr. E.D. La. 2003) (quoting *Thoms v. Educ. Credit Mgmt. Corp. (In re Thoms)*, 257 B.R. 144, 149 (Bankr. S.D. N.Y. 2001)).

## CONCLUSION

The Bankruptcy Code and courts across the country need clarification of the meaning of undue hardship. Control of the hardship must be reflected in this clarification. Student loans can be incurred by virtually anyone, without regard to their ability to repay. Because neither the government nor the lenders have purported to guarantee any value from the voluntary pursuit of a post-secondary degree, the bankruptcy implications of student loans are different than the implications for other types of financial obligations. This requires a repositioning of the remedial nature of bankruptcy proceedings with regard to student loans. This repositioning of the remedial nature of bankruptcy simply requires that the debtors bear some responsibility for incurring these large, unsecured student loans. It is appropriate to place that burden on the debtor. Otherwise, a post-secondary education cannot sustainably be offered to the majority of applicants. Some courts discuss on their own the importance of control. But explicitly requiring a lack of control over the hardship would change the result in many cases, would better maintain the integrity of the exception, and would make the legal analysis clearer to all parties involved in the process, including the debtor themselves.





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